Supreme Court, U.S.
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No. 07-864

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

JOANNE ROWLAND, ESQ.

PETITION FOR A WRIT OF CERTIORARI TO THE OF APPEALS OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER PETITIONER'S FEDERAL CONSTITUTION RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW IS VIOLATED BY THE DECISION OF THE NEW YORK COURT OF APPEALS THAT A LEGAL MALPRACTICE PLAINTIFF, IN ORDER TO ESTABLISH PROXIMATE CAUSE, MUST DEMONSTRATE THAT "BUT FOR" THE ATTORNEY'S NEGLIGENCE PLAINTIFF WOULD HAVE PREVAILED IN THE MATTER AT ISSUE, WHEREAS OTHER TORT PLAINTIFFS NEED ONLY SHOW THAT THE DEFENDANT'S NEGLIGENCE IS A SUBSTANTIAL FACTOR IN PRODUCING THE INJURY, RATHER THAN THE ONLY CAUSE.

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OPINION BELOW

The opinion of the Court of Appeals of the State of New York is attached as Appendix 1a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the decision of the Court of Appeals of the State of New York, affirming the order granting legal fees to Respondent Rowland and dismissing Petitioner's counterclaim for legal malpractice, on June 28, 2007. A timely Application For Extension Of Time To File A Petition For Writ of Certiorari (No.07A235) was granted by Justice Ginsburg extending Petitioner's time to file to November 26,2007.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section1257(a) to review state court decisions presenting a federal question.

RELEVANT PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "(N) or shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. CONST. Amend. XIV, Sec.1

The Equal Protection Clause of the Fourteenth Amendment provides in relevant: part, "nor shall any State...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, Sec.1.

According to 28 U.S.C. Sec. 1257(a), review of state court decisions is allowed in the following circumstances:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where... any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT

In June, 1997, Respondent Joanne Rowland agreed to serve as local counsel for Petitioner and his brother, the sole distributees-at-law in a contested probate proceeding entitled Will of Abraham Warsaski. In the period June through August, 1997, respondent Rowland substituted in as local counsel and represented that she was an expert in New York Law and Surrogate's Court procedure. It is without dispute that Ms. Rowland reviewed the papers in the case, consisting *inter alia* of discovery proceedings conducted over the preceding four years, and was aware of the evidence available to objectants. Ms. Rowland even went to Chicago and met with and advised Petitioner, his brother, and their Illinois counsel regarding the case and helped them prepare for trial. In August, 1997, approximately one month prior to the scheduled trial in the Surrogate's Court, Ms. Rowland agreed to serve as sole trial counsel.

Petitioner's objection was based on the claim that, in light of numerous suicide attempts, imagined illnesses and utterly irrational writings made by his uncle Abraham Warsaski contemporaneous to the execution of a 1992 will, he lacked testamentary capacity with respect to the 1992 will and certain other prior wills. The malpractice concerns Ms. Rowland's advice that the Dead Man's Statute, N.Y. C.P.L.R. 4519, did not apply, her failure to advise that it would bar Petitioner from testifying, and her failure to procure in time for trial, even after having been given a continuance by the court to do so, a handwriting expert to authenticate the handwriting of the decedent.

The will contest was tried before a jury, and after the first day, the court directed a verdict dismissing the will challenge. On the morning of trial, however, a settlement offer of $108,000 had been presented by the proponent and,based on Ms. Rowland's optimism, the offer was rejected. The judge in the Surrogate's Court confirmed the existence of this settlement offer, which was made in the Court's presence on the morning of the trial.

After the unsuccessful trial, Rowland filed an order to show cause dated October 9, 1997, in the Surrogate's Court, seeking to be relieved as counsel and seeking an order pursuant to N.Y. S.C.P.A. 2110 to have her legal fees determined. Petitioner made an application to have counterclaims to the legal fee claim adjudicated in an Illinois court where Petitioner had already commenced a malpractice proceeding. After the Surrogate appeared to have declined the application, Petitioner interposed, in the Surrogate's Court, a counterclaim and answer asserting a

counterclaim for malpractice seeking damages of $108,000 and a beach of contract claim seeking $115,000.00. (A4-14).

The Counterclaims

Petitioner contends that due to faulty advice, inadequate legal research and lack of preparation, Ms. Rowland misadvised him and his Chicago counsel about their prospects of prevailing at trail and, indeed, as a direct result of her lack of skill, Petitioner was unable to obtain the necessary authentication to admit into evidence certain manuscripts and other writings made by the decedent in the period contemporaneous to the execution of the wills, and was thereby unable to present to the jury expert opinion testimony by a psychiatrist retained by Petitioner to prove his uncle's lack of testamentary capacity. The Appellate Division, First Department, in an earlier decision and order dated February 23, 1999, held that the failure to have such documentation admitted into evidence was fatal to the objection.

The counterclaims assert claims for the $108,000.00 settlement, and all sums previously paid to Rowland.

By decision dated January 14, 2002, the Surrogate's Court granted the fee petition, awarding Rowland $16,608.00 plus disbursements of $245.42, denied the request to decline jurisdiction of the malpractice claim in favor of the Illinois action (thereby ruling on an application made by Appellant *pro se* in an Affirmation dated December 3, 1997), denied recusal and dismissed the counterclaims on the ground that

Petitioner had failed to prove as a threshold requirment that the alleged negligence was a proximate cause of any damages.

By Notice of Appeal dated October 26, 2004, an appeal was taken to the Appellate Division, First Department, challenging the Surrogate's Court's exercise of jurisdiction over the malpractice claim, its denial of the recusal motion, and its dismissal of the malpractice and breach of contract counterclaim asserted against Ms. Rowland.

By Order and Decision dated July 6, 2006, the Appellate Division unanimously held that there was jurisdiction in the Surrogate's Court to determine the counterclaim asserting attorney malpractice, and that the denial of recusal was proper. The Appellate Division was divided however, 3-2, on the issue of whether the malpractice counterclaim should have been dismissed at the pleading stage. (A19-21).

Petitioner seeks a writ of certiorari to review this decision.

REASONS FOR GRANTING THE PETITION

I. PETITIONER'S FEDERAL CONSTITUTION RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW IS VIOLATED BY THE DECISION OF THE NEW YORK COURT OF APPEALS THAT A LEGAL MALPRACTICE PLAINTIFF, IN ORDER TO ESTABLISH PROXIMATE CAUSE, MUST DEMONSTRATE THAT "BUT FOR" THE ATTORNEY'S NEGLIGENCE PLAINTIFF WOULD HAVE

PREVAILED IN THE MATTER AT ISSUE, WHEREAS OTHER TORT PLAINTIFFS NEED ONLY SHOW THAT THE DEFENDANT'S NEGLIGENCE IS A SUBSTANTIAL FACTOR IN PRODUCING THE INJURY, RATHER THAN THE ONLY CAUSE.

A. Petitioner's Federal Constitutional Guarantee To Due Process Of Law Is Abridged Where New York Arbitrarily Imposed A Causation Requirment In Petitioner' a Legal Malpractice Action Which Effectively Denied Him Access To The Courts, And Which Was Not Narrowly Tailored To A Compelling Governmental Interest.

"The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process." Bowers v. City of Flint, 325 F. 3d 758, 763 (6th Cir.2003). These limitations provide "heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct.2258 (1997). Such rights are those "deeply rooted in this Nation's history and tradition, " Moore v. City of East Clevland, 431 U.S. 494, 503,97 S Ct. 1932 (1977), or "implicit in the concept of ordered liberty", such that "neither liberty nor justice would exist if they were sacrificed..." Glucksberg, supra, 521 U.S. at 721. "The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words

'liberty'and 'due process of law'." Id. at 763.(Souter , J concurring).

Among those fundamental rights and interests are integration in public education, Bolling v. Sharpe, 347 U.S. 497, 500, 74 S. Ct. 693(1954); interracial marriage, Loving v. Virginia, 388 U.S. 1, 12, 87S.Ct.1817 (1967); maritial privacy and contraception, Carey v. Population Services Int'l, 431 U.S. 678, 684-91, 97 S. Ct. 2010 (1997); abortion, Planned Parenthood of Southeastern Pa. V. Casey, 505 U.S. 833, 849, 112 S. Ct. 2791 (1992); and personal control of medical treatment, Cruzan v. Director, Mo. Dept.Of Health, 497 US. 261, 287-89, 110 S. Ct. 2841 (1990)

It is axiomatic that the right of access to the courts is one of those fundamental rights in interests protected by due process. In Logan v. Zimmerman Brush Co. 455 U.S. 422, 102 S. Ct.1148 (1982), this court addressed the issue of "whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." 455 U.S. at 424. Answering this question in the negative, Justice Blackman, writing for the Court, began by noting that in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652 (1950), " the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."Logan, 455 U.S. at 428 (emphasis added) Justice Blackman also observe that "(t)his conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property

or as plaintiffs attempting to redress grievances." Id. At 429. Logan also cited to Martinez v. California, 444 U. S. 277, 281-82, 100 S.Ct. 553 (1980) for the proposition that "a state tort claim is a 'species of property' protected by Due Process Clause." Logan, 455 U.S. at 429, fn.4.

See also, Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 485-88, 108 S. Ct. 1340 (1988) (unsecured claim against estate is an intangible property interest protected by Due Process Clause of Fourteenth Amendment, and "the substantial involvement of the probate court throughout the process [is] sufficient government action to implicate the Due process Clause."); Shelly v. Kramer, 334 U.S. 1, 14,68 S. Ct. 836 (1948) ("the action of state courts and judicial offices in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment....").

To be sure , as Logan stated, "the State certainly accords due process when if terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." Logan, 455 U.S. at 437. (emphasis added) In the content of fundamental rights such as access to the courts, government rules that burden the exercise of those rights "are subject to strict scrutiny", and will be upheld as reasonable'only when they are narrowly tailored to a compelling governmental interest." John Does II & III v.Munoz, 2007 WL 3341731, *2 (6th Cir. Nov.13,2007).

In the case at bar New York's proximate cause requirement is not "narrowly tailored" because it sets an impermissibly high standard which makes the

successful prosecution of a legal malpractice case virtually impossible. There are legitimate policy considerations in determining proximate causation standards. "(T)he concept stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct." Mortenson, v,Memorial Hospital, 105 A.D.2d 151, 157 (1st Dept.1984). See *also,Ventricelli v Kinney System Rent A Car,* 45 N.Y.2d 950, 952 (1978);*Palsgraf v. Long Island R.R. Co.*, 248 N.Y.339, 352 (1928).

But proximate cause, properly understood, is not a 100% guarantee. In other areas it only requires a showing of a reasonable degree of certainty, not an absolute guarantee of success. For example, one does not need to prove that one would have recovered to full health but for medical malpractice when suing a medical professional. Indeed, the standard in a medical malpractice case is that the negligence be a substantial factor in producing the injury, not the only cause. *See, Mortenson v. Memorial Hospital*, 105 A..D 2d 151, 158 (1st Dep't 1984); *Koster v. Greenberg*, 120 A.D.2d 644, 645 (2d Dep't 1986). ("The plaintiff is not obligated to eliminate all possibility that the injuries resulted from causes other than the defendant's negligence."). *(Id.)*. To require a plaintiff in a legal malpractice case to prove that they would have prevailed but for the attorney's negligence requires him to prove that the attorney's malpractice was the sole cause of his lack of success in the matter, or simply leaves him no right of action at all.

Nor does the proximate cause requirement at this level relate to even a legitimate, let alone a compelling, governmental interest. The only rationale

for requiring a legal malpractice plaintiff to prove he would have achieved total victory at trial in the underlying case is either protection of the legal profession, or limiting access to the courts. Neither is a legitimate objective. The State has no business protecting attorneys in circumstances where another person, or even another type of professional, would not be protected. See, Argument IB, *infra*.

Society receives no benefits from giving a free pass to attorneys who vary from the standard of care required in a particular case by burdening the former client with a definition of proximate cause that cannot, except in extraordinary cases, be overcome. The standard applied by New York, as a practical matter, means that attorneys can only be found negligent in the simplest and most straightforward cases where a lesser level of skill would be required of the attorney. Indeed, the profession, and the persons it serves, would be better served were the inquiry focused on the attorney's standard of care, and not whether, regardless of the standard of care applied, the plaintiff would have prevailed. Had that inquiry actually been permitted here, and the Court or the finder of fact been permitted to review the facts of the case, Respondent might not have been awarded her fees, and she might have been found liable for the results of her faulty advice-the improvidently rejected settlement offer.

For all the reasons set forth above, New York's proximate cause requirement Petitioner's legal malpractice case violated his federal constitutional guarantee to due process of law, and this Petition should be granted.

B. Petitioner's Federal Constitutional Right To Equal Protection Of The Law Was Violated Because New York Treats Similarly Situated Malpractice Plaintiffs Differently Without Any Rational Justification Related To A Legitimate State Interest.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State Shall 'deny to any person within its jurisdiction the equal protection of the laws', which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249 (1985). The general rule is that the differential treatment must be rationally related to a legitimate state interest. Schweiker v. Wilson, 450 U.S.221, 230, 101 S. Ct. 1074 (1981).

In Cleburne, supra, the city required a special use zoning permit only for homes for the mentally retarded. This Court invalidated the requirement:

> Because our view the record does not reveal any rational basis for believing that the [mentally retarded] home would pose any special threat to the city's legitimate interests, we affirm the judgement below insofar as it holds the ordinance invalid as applied in this case...
> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like...[T]he

> City may not avoid the strictures of that [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 473 U.S. at 448. (emphasis added).

See also, Logan v. Zimmerman Brush Company, supra, 455 U.S. at 439-442 ("But the rational-basis standard is not a toothless one; the classificatory scheme must 'rationally advanc[e] a reasonable and identifiable governmental objective'..." [T]he Equal Protection Clause imposes a requirment of some rationality in the nature of the class singled out,' and that rationality is absent here.")

(Blackman, J. concurring).

That rationality is also absent in the case at bar. New York treats persons suing for malpractice differently, depending solely upon whether the individual being sued is an attorney. If the claim is for any type of injury or malpractice except legal malpractice, plaintiff need only show the general standard of proximate cause; that is, a reasonable degree of certainty that defendant's conduct caused plaintiff's injury. See, Mortenson v. Memorial Hospital, supra; Koster v. Greenberg, supra. However, if the malpractice or injury claimed is legal in nature, suddenly and for no other reason the plaintiff must show proximate cause to an absolute certainty; that is plaintiff must meet the "but for" test. This is not fair and makes no sense.

A desire by judges to protect their fellow attorneys does not satisfy the rational basis test because that is not legitimate state interest. To paraphrase this Court in Cleburne, New York may not avoid the strictures of the Equal Protection Clause by deferring to the wishes or objections of some fraction of the body politic, even if that "fraction" consists of the lawyers. See also, Miller v. Carter, 547 F.2d 1314, 1316 (7th Cir. 1977) (Chicago ordinance permanently barring persons convicted of certain offenses from obtaining a public chauffeur's license, but allowing a person with a license who was convicted of the same offenses to retain that license, "discriminate(s) irrationally" because "no justification exists for automatically disqualifying one and not the other.").

CONCLUSION

For the reasons set forth above, this Petition should be granted, and a Writ of Certiorari should issue to review the decision of the Court of Appeals of the State of New York.

Respectfully submitted,

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Howard Leder, as Preliminary Executor of the Estate of Abraham Warsaski, Deceased, Proponent, v Marshall Spiegel, Appellant. Joanne Rowland, Esq., Respondent.

No. 91

COURT OF APPEALS OF NEW YORK

2007 NY Slip Op 5588; 9 N.Y.3d 836; 872 N.E.2d 1194; 840 N.Y.S.2d 888; 2007 N.Y. LEXIS 1619

June 28, 2007, Decided

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THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: Jeffrey A. Barr, for appellant.

Leo Fox, for respondent.

JUDGES: Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

OPINION BY: The order of the Appellate Division should be affirmed

OPINION

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

After unsuccessfully representing two objectants at a will contest trial in Surrogate's Court, respondent attorney petitioned the same court for legal fees. In their answer, objectants counterclaimed for legal malpractice, arguing that, but for respondent's negligent representation, they would have accepted a $ 108,000 settlement. In particular, objectants cited respondent's failure to anticipate that Surrogate's Court would not admit certain evidence. Respondent moved pursuant to **CPLR 3211(a)(7)** for an order dismissing objectants' counterclaim.

Surrogate's Court dismissed objectants' counterclaim and awarded respondent her legal fees. In a 3-2 decision, the Appellate Division affirmed. Objectants appeal as of right, and we now affirm.

"In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence"(AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 866 N.E.2d 1033, 834 N.Y.S.2d 705 [2007] [internal citations omitted]). Under the circumstances of this case, objectants' allegation regarding respondent's failure to anticipate the court's evidentiary rulings -- even if accepted as true -- does not establish negligence. Thus, objectants did not allege a prima face case of legal malpractice and the courts

below properly dismissed their counterclaim. Objectants' remaining contentions also lack merit.

Order affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 28, 2007

7851N, File 4323/93

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Howard Leder, as Preliminary Executor of the Estate of Abraham Warsaski, Proponent, v Marshall Spiegel, Objectant-Appellant, Michael Spiegel, Objectant, Joanne Rowland, Esq., Petitioner-Respondent.

July 6, 2006, Decided
July 6, 2006, Entered

NOTICE: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: Jeffrey A. Barr, New York, for appellant.

JUDGES: Tom, J.P., Mazzarelli, Saxe, Nardelli, McGuire, JJ. All concur except Saxe and McGuire, JJ. who concur in part and dissent in part in a memorandum by McGuire, J.

OPINION

Order, Surrogate's Court, New York County (Renee R. Roth, S.), entered on or about May 28, 2002, which granted petitioner attorney's application for legal fees and disbursements against appellant and granted petitioner's motion to dismiss appellant's counterclaims against petitioner, affirmed, without costs.

Petitioner's representation of appellant as an objecting distributee and interested person in a probate proceeding *(258 A.D.2d 379, 685 N.Y.S.2d 684 [1999], lv denied 93 N.Y.2d 810, 716 N.E.2d 697, 694 N.Y.S.2d 632 [1999], cert denied 528 U.S. 1066 [1999])* gave the Surrogate jurisdiction to hear petitioner's application for legal fees (*SCPA 2110[1]*), to award attorneys' fees against appellant personally (*see Matter of Levine, 262 A.D.2d 80, 692 N.Y.S.2d 32 [1999]*), and to determine appellant's counterclaims for legal malpractice and breach of contract arising out of petitioner's representation of appellant in the probate proceeding (*NY Const, art VI, § 12[d]*; *see Matter of Tarka, 293 A.D.2d 396, 740 N.Y.S.2d 627 [2002], lv denied 99 N.Y.2d 530, 782 N.E.2d 564, 752 N.Y.S.2d 587 [2002]*; *see generally Matter of Piccione, 57 N.Y.2d 278, 287-289, 442 N.E.2d 1180, 456 N.Y.S.2d 669 [1982]*). The record does not reveal bias on the part of the Surrogate; thus recusal was properly denied (*see People v Moreno, 70 N.Y.2d 403, 405-406, 516 N.E.2d 200, 521 N.Y.S.2d 663 [1987]*; *Tarka, supra*).

With regard to that branch of petitioner's motion which sought dismissal of appellant's legal malpractice counterclaims, it is well settled that in considering a motion to dismiss brought pursuant to *CPLR 3211(a)(7)*, the court must presume the facts pleaded to be true and must accord them every favorable inference (*Cron v Hargro Fabrics, 91 N.Y.2d 362, 366, 694 N.E.2d 56, 670 N.Y.S.2d 973 [1998]*; *Delran v Prada USA, Corp., 23 AD3d 308, 804 N.Y.S.2d 243 [2005]*). It is, however, also axiomatic that factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by

documentary evidence, are not entitled to such consideration (*Skillgames, LLC v Brody, 1 AD3d 247, 250, 767 N.Y.S.2d 418 [2003]*; *Caniglia v Chicago Tribune-New York News Syndicate, Inc., 204 A.D.2d 233, 233-234, 612 N.Y.S.2d 146 [1994]*).

In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages (*Reibman v Senie, 302 A.D.2d 290, 756 N.Y.S.2d 164 [2003]*); *Schwartz v Olshan Grundman Frome & Rosenzweig, 302 A.D.2d 193, 198, 753 N.Y.S.2d 482 [2003]*). In order to establish proximate cause, plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any "ascertainable damages" (*Brooks v Lewin, 21 A.D.3d 731, 734, 800 N.Y.S.2d 695 [2005]*; *Reibman v Senie, 302 A.D.2d at 290-291*). The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent (*Schwartz v Olshan Grundman Frome & Rosenzweig, 302 A.D.2d at 198*; *Pellegrino v File, 291 A.D.2d 60, 63, 738 N.Y.S.2d 320 [2002], lv denied 98 N.Y.2d 606, 774 N.E.2d 221, 746 N.Y.S.2d 456 [2002]*).

In the matter at bar, appellant Marshall Siegel's malpractice claim rests on the unsupported, conclusory assertion that he would have accepted the settlement offer but for petitioner's erroneous advice concerning his prospect of success at trial. There is no support for his claim in the voluminous record this matter has generated, nor is there anything in the record, such as an affidavit from his co-objectant brother Michael, to

refute petitioner's claim that she actively encouraged the brothers to accept the settlement, but that appellant alone had refused over Michael's protestations. Moreover, as the Surrogate notes in her decision, the settlement negotiations occurred "on many occasions" and were ongoing up to the morning of trial. Finally, in an affirmation signed on October 11, 1999, appellant stated that the settlement offer he now claims petitioner counseled him to refuse, remained open, but that he and his brother were refusing to accept it (again, without any substantiation from the brother) without verification of the value of the estate. There is, however, no indication that such an accounting has ever been provided, rendering appellant's claim that he refused the settlement strictly on petitioner's advice to be suspect, at best.

Accordingly, since appellant's claim is based upon nothing but bare allegations of fact and conclusory legal arguments (*see Dweck Law Firm v Mann, 283 A.D.2d 292, 293, 727 N.Y.S.2d 58 [2001]*; *Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener, 290 A.D.2d 380, 381, 736 N.Y.S.2d 666 [2002]*, *lv denied 98 N.Y.2d 603, 772 N.E.2d 605, 745 N.Y.S.2d 502 [2002]*), it was properly dismissed by the Surrogate's Court.

All concur except Saxe and McGuire, JJ. who concur in part and dissent in partin a memorandum by

McGuire, J. as follows:

CONCUR BY: McGUIRE (In Part)

DISSENT BY: McGUIRE (In Part)

DISSENT

McGUIRE, J. (concurring in part, dissenting in part)

I agree with the majority that the Surrogate had jurisdiction to hear and decide petitioner's application and appellant's counterclaim, and that the Surrogate properly denied appellant's motion for recusal. I believe, however, that the Surrogate erred in granting that aspect of petitioner's motion which sought dismissal of appellant's legal malpractice counterclaim. Accordingly, I respectfully dissent.

"When evidentiary material is considered [on a motion pursuant to *CPLR 3211(a)(7)*], the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]*).

To state a cause of action for legal malpractice, a party must establish that the attorney was negligent, that the negligence was a proximate cause of the loss sustained, and actual damages (*Brooks v Lewin, 21 AD3d 731, 734, 800 N.Y.S.2d 695 [2005]*). A party may establish liability based on loss of a settlement opportunity where the party can establish that, but for the attorney's negligence, he would have accepted the settlement offer (*see Masterson v Clark, 243 A.D.2d 411, 412, 663 N.Y.S.2d 210 [1997]; see also Rubenstein & Rubenstein v Papadakos, 31 A.D.2d 615, 295 N.Y.S.2d 876 [1968], affd 25 N.Y.2d 751, 250 N.E.2d*

570, 303 N.Y.S.2d 508 [1969]; *cf. Cannistra v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins, 286 A.D.2d 314, 728 N.Y.S.2d 770 [2001], lv denied 97 N.Y.2d 611, 767 N.E.2d 152, 740 N.Y.S.2d 695 [2002]*). Here, appellant's malpractice claim is based on petitioner's alleged negligence in erroneously advising appellant that he could prove the decedent's lack of testamentary capacity through certain of the decedent's writings, and that, but for this erroneous advice, appellant would have accepted the proponent's settlement offer in the probate proceeding. Based on the evidence in the record, particularly appellant's answer and affidavit in opposition to petitioner's motion to dismiss, appellant has a cause of action for legal malpractice. Appellant specifically averred that he would have accepted the settlement offer had petitioner properly evaluated the merits of his objections to probate of the will and correctly advised appellant of his chances of success thereon. Therefore, appellant's counterclaim for legal malpractice should be reinstated (*see Rubenstein & Rubenstein v Papadakos, supra*; *cf. Cannistra v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins, supra; Masterson v Clark, supra*).

The majority relies in part on petitioner's claim that she actively encouraged a settlement and that appellant and his brother refused to accept it. These assertions, even assuming their truth, do not undercut appellant's malpractice claim in the slightest. Fairly read, appellant's malpractice claim is that he would have accepted the settlement offer if petitioner had given him correct advice about his prospects for success on his challenges to the probate of the will. That appellant rejected the settlement offer for other reasons - good,

bad or otherwise - hardly negates his contention that he would have accepted it but for petitioner's alleged malpractice. If the majority maintains that this contention is a "conclusory legal argument," the majority errs; it is an assertion of fact, what appellant would have done. To the extent the majority relies on this contention being a "bare" or "unsupported" allegation, that would only underscore that the majority is improperly resolving the issue of credibility against appellant on petitioner's motion to dismiss pursuant to *CPLR 3211*.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 6, 2006

SURROGATE'S COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

HOWARD LEDERER, a Preliminary Executor of the Estate of ABRAHAM WARSASKI, Proponent, - against

MARSHALL SPIEGEL and MICHAEL SPIEGEL, Objectants.

File No. 4323/93

OBJECTANTS' ANSWER TO FEE PETITION of JOANNE ROWLAND, ESQ. AND COUNTERCLAIMS AGAINST MS. ROWLAND

Objectants Marshall Spiegel and Michael Spiegel, by their attorneys, Bondy & Schloss LLP, as and for their answer to the affirmation of Joanne Rowland, dated October 8, 1997, allege as follows

1.Respectfully refer the Court to the of affidavit of Marshall Spiegel and the affidavit of Daniel C. Meenan, Jr., both sworn to-December 3, 1997, and incorporates the statements contained therein as if set forth fully herein.

FIRST COUNTERCLAIM

Legal Malpractice Against Joanne Rowland, Esq.

2. Objectant Marshall Spiegel is the nephew of Abraham Warsaski and is a resident of the State of Illinois.

3. Objectant Michael Spiegel is the nephew of Abraham

Warsaski and is a resident of the State of Illinois.

4. Upon information and belief, Joanne Rowland is an attorney admitted to practice law in the State of New York

5.In or about December, 1993, Marshall Spiegel and Michael Spiegel (collectively referred to as "SPIEGEL") filed an objection to the probate of the Will of Abraham Warsaski in this proceeding. Abraham Warsaski was SPIEGEL'S uncle. Warsaski left an Estate of between $500,000.00 and $800,000.00. SPZEGRL were the only heirs at law of Abraham Warsaski. The Will which was offered in probate-in the Estate was challenged by SPIEGEL given their knowledge that at the time of execution of the Will Abraham Warsaski lacked testamentary capacity. The Will offered in probate left none of Abraham Warsaski's estate to SPIEGEL or his brother. If the objection was sustained, SPIEGEL would have taken the entire Estate by intestacy as a matter of law.

6.Between early 1994 and May, 1997 SPIEGEL was represented by a Chicago attorney who had been admitted in this action pro hac vice. In or around April, 1997, disputes existed between SPIEGEL and his Chicago counsel which lead to thellatter's request that he be permitted to leave to withdraw as counsel.. SPIEGEL filed objections to that withdrawal contradicting the substantive allegations which were-offered in support of the request and pointing out the fact that he would be left at a disadvantage should his attorney be permitted leave to withdraw under the circumstances. Nonetheless, on or about May 29, 1997 SPIEGEL's Chicago attorney was permitted leave to

withdraw, leaving SPIEGEL without counsel.

7. At or about the same time, SPIEGEL had retained another Chicago attorney to look into the representation of his interests in his uncle's Estate in the event that the motion for leave to withdraw was granted. When in fact that motion was granted, SPIEGEL's second Chicago counsel sought leave to appear in the stead of the withdrawing attorney. By the same order permitting the first attorney to withdraw, this Court also ruled that no other attorney would be granted leave to appear pro hac vice under.applicable New York statutes-absent-the involvement of a professionally responsible New-York attorney.

8. In mid-June, 1997, SPIEGEL and his representatives contacted ROWLAND; transmitted information to her regarding the issues involved in the contested Estate; and discussed-the status of and the clams asserted by SPIEGEL in detail. On or about June 17, 1997, SPIEGEL-employed and retained ROWLAND as his attorney in this proceeding. The attorney-client relationship with ROWLAND was formed in Chicago, Cook County, Illinois . . At that time SPIEGEL paid ROWLAND the initial, requested retainer. At or about that same time, additional facts,'pleadings,information and other pertinent matters and materials regarding the contested.probate issues were conveyed to ROWLAND. Within a matter of weeks, ROWLAND formally appeared in this proceeding. The terms of the oral contract between SPIEGEL and ROWLAND provided that she would perform all services necessary in connection with the provision of legal advice and consultation to SPIEGEL, the preparation for trial, research and advice regarding pertinent issues at hand,

completion of any outstanding discovery, preparation for and trial of the anticipated jury trial then scheduled for early September, 1997. She was to be paid on an hourly rate basis.

9. Although SPIEGEL initially anticipated involvement of his second local, Chicago counsel, it was expressly understood and agreed to with ROWLAND that she would be relied upon and would be professionally responsible exclusively, for all matters involving or unique to the laws of the State of New York. In connection with the actual trial of the case, her involvement was initially to be ministerial in nature. However, this expected role changed. SPIEGEL at all times relevant relied upon ROWLAND exclusively in connection with trial and regarding legal research and legal advice involving the laws of the State of New York.

10. In mid-August, 1997, over the telephone, this Court advised ROWLAND that sPIEGEL's Chicago lawyers' request for admission pro hac vice had been denied and that the case would proceed to trial with ROWLAND as sole counsel. SPIEGEL had numerous telephone conversations with ROWLAND at this time. She specifically. reassured SPIEGEL that she was an experienced trial attorney; that she was ready, willing and able to perform all services necessary in connection with the successful pursuit of SPIEGEL's objection to the admission of the Will of Abraham Warsaski to probate; that she was familiar with substantive and procedural matters in the Surrogate's Court of New York County; that she had already familiarized herself with the facts of the case and was conversant with all applicable law; and that she was quite anxious to

proceed as SPIEGEL's counsel in connection with the entire matter.

11. As of mid-August, 1997, the Estate of Abraham Warsaski had offered SPIEGEL the sum of $108,000.00 in settlement of his objection to the admission of the Will of Abraham Warsaski to probate. This offer was extended at a time when the Estate was believed to be valued in the range of $500,000.00 to $800,000.00 Despite inquiry through the Court, SPIEGEL (and later ROWLAM) had been unable to obtain specific information as to the-value or the assets of the Estate. The offer of $108,000.00 had been secured through extensive pretrial discussions and negotiations between the Estate and SPIEGEL's first Chicago counsel who had since withdrawn, prior to ROWLAND1s involvement. On several occasions after she appeared as SPIEGEL's attorney, that offer was renewed, reconveyed and affirmed. Thus, at the time the matter was reached for trial in early September, 1997, SPIEGEL was faced with the choice between accepting an offer of $108,000.00 in settlement of his claims and a potential, best case outcome of between $500,000.00 and $800,000.00. Eased upon the advice of ROWLAND as to his substantive chances for success, as will be more fully explained in the following. SPIEGEL chose to reject the settlement offer and to proceed to trial,

12. Critical to SPIEGEL's case and to his pretrial decisions with regard to pursuit of his claim versus acceptance of settlement proposals were three critical issues of law, all

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controlled by New York law. At all times relevant to this action, ROWLAND was exclusively responsible to

provide research and advice with respect to those legal issues. SPIEGEL relied exclusively and extremely heavily upon the advice of ROWLAND with respect to these issues of New York law. Specifically, the critical issues or areas of law were as follows:

(a) Would SPIEGEL's testimony with respect to his relationship with his late'uncle be permitted, given the proscriptions of the New York "Dead Man's Statute";
(b) Would SPIEGEL be permitted to authenticate critical writings of his late uncle even given proscriptions of the New York "Dead Man's Act", regardless of whether or not his other testimony was barred under that statute
(c)And, most importantly, as a last resort, if SPIEGEL's testimony were barred under the "Dead Man's Act" and if SPIEGEL were unable to authenticate the documents and manuscripts involved; were the documents nonetheless a proper basis of expert analysis and opinion, in the nature of that which is permitted in Illinois and under Federal Rule of Evidence, 703.

13. SPIEGEL, was advised and counseled by ROWLAND that his testimony regarding his personal relationship with his late uncle was likely to be rejected; that there was reasonable likelihood that he would be permitted to authenticate the papers of his late uncle; and that without question, regardless of their admissibility or of SPIEGEL's testimony, his psychiatric expert witness would be permitted to testify that he reviewed, utilized and relied upon those same papers as the types of materials reasonably relied upon by experts in his field in forming

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could and should have been made, thereby waiving those problems and deficiencies;

(e) Failed to advise SPIEGEL as to the probability if not certainty that he would lose on all three of the propositions of law which had been discussed at length with ROWLAND and regarding which she had assured SPIEGEL his position was supportable, well taken and provable;

(f) Provided advice regarding the use by SPIEGEL'S psychiatric expert witness of the relevant papers and manuscripts of Abraham Warsaski which was contrary to fundamental New York law, which resulted in the Court's refusal to hear any expert testimony whatsoever in support of SPIEGEL's position.

(g) Provided incorrect and inaccurate advice regarding the status of the law in New York as to the applicability of the New York "Dead Man's Statute"in general to the issues at hand;

(h)Provided advice and research to SPIEGEL which was diametrically opposed to the actual state of the law in New York, the net effect of which was to provide SPIEGEL with virtually no evidence whatsoever in support of his case; and

(i)otherwise carelessly and negligently failed to exercise a reasonable degree of skill and care in connection with her representation of SPIEGEL's interests in this proceeding.

16. As a result of the foregoing, after less than one day of trial, SPIEGEL was unable to present any evidence whatsoever in support of his position, and a verdict was directed in favor of

the Estate admitting the Will of Abraham Warsaski to probate, ensuring that SPIEGEL would take nothing of

the Estate. That Order was entered in or about September 28, 1997.

17. From approximately June, 1997 through approximately September 28, 1997 SPIEGEL relied reasonably and totally upon the advice, expertise and legal representation of ROWLAND in connection with his claims in this proceeding. As of September 28,1997, SPIEGEL had been unable to present any competent evidence whatsoever at trial and lost on virtually every issue which he attempted to raise at trial as a result of ROWLAND's professional negligence and breach of contract. Furthermore, at trial, ROWLAND failed to raise numerous evidentiary and other objections which were available to SPIEGEL.

18. Without a doubt, had SPIEGEL been apprised of the accurate state of the law in New York between June, 1997 and September 28, 1997, he certainly would have accepted the $108,000,00 offer of settlement which had been extended. As he now knows, given the state of the law in New York at relevant times he was not able to present any evidence in support of his position; he was not able to authenticate the manuscripts and papers of his late uncle necessary to his theory of the case; and most importantly, his psychiatric expert witness was not able to rely upon those documents due their inadmissibility. ROWLAND's advice to him with regard to these legal issues was one hundred percent inaccurate in that well established New York law clearly prohibits the use of these materials under such circumstances.

19. As a direct and proximate result of one or more of the foregoing acts, omissions and commissions, and

certainly as a consequence of ROWLAND'S one hundred percent inaccurate legal analysis and her misrepresentations regarding applicable New York law, SPTEGEL was severely and irreparably prejudiced in connection with his claim and was virtually unable to present any evidence whatsoever in support of his theory or his position. Accordingly, he never had any chance of succeeding on the merits at trial; he lost the $108,000.00 offer of settlement which he surely and certainly would have accepted had he known the true state of relevant affairs and the law; he suffered the payment of expenses and attorneys' fees in connection with preparation for and the trial of the action; and he otherwise suffered monetary losses occasioned proximately by ROWLAND's conduct.

20. As a result of the foregoing negligent acts and omissions on the part of ROWLAND, and as a consequence thereof, SPIEGEL has suffered damages in excess of $115,000.00

SECOND COUNTERCLAIM
Breach of Contract

21. SPTEGEL repeats and realleges paragraphs 1 through 20. 22. Under the retainer agreement between SPIEGEL and ROWLAND, ROWLAND specifically contracted with SPIEGEL to skillfully, carefully, diligently and competently represent SPIEGEL in the prosecution of his objections to the probate of the will of Abraham Warsaski.

23. By failing to prosecute his case properly, and by engaging in the acts of negligence set forth in paragraph 15 of this answer and counterclaims, ROWLAND breached her contract with SPIEGEL.

24. By reason of this breach of contract, SPIEGEL has suffered damages in excess of $115,000.00.

WHEREFORE, Marshall Spiegel and Michael Spiegel pray for the entry of judgment in their favor' and against Joanne Rowland in an amount not less than $115,000.00 plus the costs and attorneys' fees incurred in connection with this proceeding.